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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAINE STATE RETIREMENT SYSTEM,
Individually and On Behalf of All Others
Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, *et al.*

Defendants.

No. 2:10-CV-00302 MRP
(MAN)

CLASS ACTION

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' NOTICE OF
RECENT AUTHORITY IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

**Date: October 18, 2010
Time: 1:00 p.m.
Courtroom: 12
Judge: Hon. Mariana R.
Pfaelzer**

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF RECENT AUTHORITY IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS

1 Plaintiffs respectfully submit this response to Defendants' Notice of Recent
2 Authority in Support of Defendants' Motion to Dismiss dated October 5, 2010 (the
3 "Notice").

4 Defendants first cite to *Footbridge Ltd. Trust v. Countrywide Home Loans,*
5 Inc., No. 09-CV-04050-PKC (S.D.N.Y. Sept. 28, 2010), a decision that rejected
6 securities *fraud* claims brought under Section 10(b) of the Securities Exchange Act
7 of 1934. Indeed, the passages defendants quote simply found that the plaintiffs'
8 allegations there were "insufficient to set forth a plausible claim of fraud based on
9 the heightened pleading standards of Rule 9(b) and the PSLRA." Notice at 2,
10 quoting *Footbridge*, at 21. Moreover, the language of *Footbridge* that defendants
11 rely upon makes it clear that the allegations in *Footbridge* were inconsistent with
12 the allegations in this action. Whereas in *Footbridge*, the court found plaintiffs'
13 complaint "does not contain allegations that the loans included in the
14 Securitizations suffered from [the alleged problems]," the Complaint here does.
15 See, e.g., Complaint ¶¶87-89 (discussing poor performance of certificates and
16 FBI's findings that early payment defaults and delinquency rates are reflective of a
17 systematic disregard for underwriting guidelines). Finally, the court in *Footbridge*
18 relied upon *Lone Star Fund V (U.S.) L.P. v. Barclays Bank PLC*, 594 F.3d 383 (5th
19 Cir. 2010), which discussed a clause permitting the repurchase or substitution of
20 loans by the originator and is irrelevant to Plaintiffs' claims here because they do
21 not assert a misrepresentation solely as to the existence of delinquent loans in the
22 pools. See Plaintiffs' Opp. to the Motion to Dismiss ("Pl. MTD Opp.") at 77-79.¹

23 *Footbridge* also struck certain limited references to allegations made in other
24 cases against Countrywide and its officers, finding under Second Circuit law that

25 ¹ Notably, Defendants' arguments for dismissal based on *Lone Star* have been
26 rejected repeatedly in the MBS context. See Pl. MTD Opp. at 77. Notably, the
27 most recent decision declining to apply *Lone Star* was issued by Judge Pechman in
Washington Mutual, one of the cases that Defendants cite as supplemental
authority.

1 *not facts*, but rather only “*allegations*” which are “based on, or rely on, complaints
2 in other actions that have been dismissed, settled, or otherwise not resolved are, as
3 a matter of law, immaterial.” As discussed in Plaintiffs’ Opposition to the Motion
4 to Strike, however, there is a formidable distinction between untested allegations
5 and factual evidence revealed in other litigation. *Footbridge* appears to recognize
6 this distinction, as the allegations struck appear to have been intended to limit
7 conclusory allegations of wrongdoing, rather than the factual evidence revealed in
8 those other actions. Compare Ex. A, *Footbridge* SAC ¶5 (quoting “conclu[sion]”
9 of California Attorney General, which was struck); with SAC ¶51 (not struck,
10 quoting from a document revealed in criminal proceeding against a Countrywide
11 employee); also compare, e.g., *Footbridge* SAC ¶216a (struck, quoting conclusory
12 allegations of California Attorney General), with Complaint ¶¶114-16 (describing
13 facts revealed in California Attorney General’s investigation). *Footbridge*
14 however is internally inconsistent as to the paragraphs that were stricken.
15 Admittedly, some paragraphs there were struck that summarized evidence revealed
16 in other complaints rather than quoted it, e.g., Complaint ¶49; however, there is no
17 explanation for this departure expressed in the *Footbridge* opinion, and it should
18 not be followed. Indeed, many of the paragraphs in *Footbridge* which were *not*
19 struck appear to be identical to facts contained in Plaintiffs’ complaint here that are
20 drawn from other complaints – to some extent, the *Footbridge* complaint simply
21 failed to cite its sources. Compare *Footbridge* SAC ¶122 (not struck, discussing
22 allegations of Mark Zachary), with Complaint ¶¶139-42 (discussing facts revealed
23 by Mark Zachary, properly crediting those facts to his complaint against
24 Countrywide). Thus, because *Footbridge* is internally inconsistent, it should not
25 be followed here.

26 Defendants next cite to *Boilermakers National Annuity Trust Fund v. WaMu*
27 *Mortgage Pass-Through Certificates, Series AR1*, No. 2:09-cv-00037-MJP (W.D.
28 PLAINTIFFS’ RESPONSE TO DEFENDANTS’ NOTICE OF RECENT AUTHORITY IN
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1 Wash. Sept. 28, 2010) (“*Washington Mutual*”) attempting to bolster their position
2 that Plaintiffs’ claims should not be tolled pursuant to *American Pipe*. Notice at 4.
3 However, *Washington Mutual* did not follow the law of this Circuit. See
4 *Valenzuela v. Kraft Inc.*, 801 F.2d 1170 (9th Cir. 1986) (tolling available for
5 plaintiffs where earlier complaint filed in state court was dismissed due to lack of
6 subject matter jurisdiction); see also Pl. MTD Opp. at 36-37.² Instead, *Washington*
7 *Mutual* reaches its conclusion relying solely on two out-of-district, non-PSLRA
8 cases, *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998) and *Palmer v. Stassinis*, 236
9 F.R.D. 460 (N.D. Cal. 2006). In *Walters*, the district court dismissed the entire
10 action after finding that none of the named plaintiffs suffered an unconstitutional
11 restriction on their access to Federal court, and thus ***no named plaintiff*** had
12 standing to pursue ***any of the claims***. *Walters*, 163 F.3d at 434 (emphasis added).
13 On appeal, the Seventh Circuit Court affirmed the lower court’s denial of the
14 motion to dismiss, without even mentioning the issue of tolling, because federal
15 jurisdiction was lacking since no plaintiff ever had standing to pursue the claims.
16 *Id.* Moreover, *Washington Mutual*’s reliance on *Palmer* is equally inapposite. In
17 *Palmer*, the district court, relying on *Walters*, disallowed tolling for a ***newly added***
18 ***state law claim*** by a proposed intervenor where neither of the original plaintiffs in

19
20 ² Furthermore, notwithstanding the Countrywide Defendants’ assertion that
21 “Plaintiffs do not cite *even a single case* that has applied *American Pipe* tolling to a
22 state court class action,” Countrywide Defendants’ Reply Brief at 10 (emphasis in
23 original), federal courts have applied *American Pipe* tolling to state court class
24 actions, including a district court decision issued two months ago. *Sawyer v. Atlas*
25 *Heating & Sheet Metal Works, Inc.*, --- F. Supp. 2d ---, 2010 WL 3212040, at *2
26 (E.D. Wis. Aug. 11, 2010) (permitting cross jurisdictional tolling and stating that
27 for purposes of *American Pipe* tolling, it does not “matter whether the [initial] class
28 action was filed in state rather than federal court” because “[t]he fact that the class
action is pending in state court would not make duplicative protective lawsuits any
less burdensome”), attached hereto as Exhibit B. Likewise, in *Washington Mutual*,
claims as to an offering initially identified in the original state court complaint,
asserted by a named plaintiff who was added to the federal action over a year later,
were tolled pursuant to *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974)
and permitted to proceed. See *Wash. Mutual Order* at 6, 15 (implicitly recognizing
cross-jurisdictional tolling for claims asserted under the Securities Act).

1 the action had standing to assert it. 236 F.R.D. at 464 (emphasis added). Thus, the
2 *Washington Mutual* opinion is both inconsistent with Ninth Circuit law and not
3 well-reasoned on this point and, accordingly, should not be applied here.³

4 Defendants' excerpts from *In re Am. Int'l Group, Inc. 2008 Sec. Litig.*, No.
5 08-CV-04772-LTS (S.D.N.Y. Sept. 27, 2010) ("AIG") appear to directly support
6 Plaintiffs' argument that, even if the doctrine of statutory standing limits named
7 Plaintiffs' ability to represent certain members of the proposed class, Plaintiffs
8 indisputably have standing to represent all purchasers on a common registration
9 statement. Quoting with approval *In re Citigroup Bond Litig.*, No. 08 Civ. 9522,
10 2010 WL 2772439, at *14 (S.D.N.Y. July 12, 2010), on which Plaintiffs' relied in
11 their Opposition brief, the AIG court held that where the common registration
12 statements contained material misstatements and omissions, standing was
13 appropriately alleged for the "same alleged injury" on all purchases from common
14 defective shelf registration statements. *In re American Int'l Grp., Inc. 2008 Sec.*
15 *Litig.*, at 40. Plaintiffs allege precisely this, as a large portion of the
16 misrepresentations and omissions alleged were contained in the Registration
17 Statements themselves, and simply repeated in the Prospectus Supplements used
18 for each Offering. See Complaint ¶¶162-64; 168-71; 177-78. Thus, AIG further
19 supports Plaintiffs' arguments.

20 Dated: October 15, 2010

Respectfully submitted,

21 **GLANCY BINKOW & GOLDBERG**
22 **LLP**

23 /s/ Michael Goldberg
Michael Goldberg
24 Lionel Z. Glancy

25 ³ However, in *Washington Mutual*, claims as to an offering initially included
26 in the original August 1, 2008 State Court Complaint, asserted by a named plaintiff
27 who was added to the action in November 2009, were tolled pursuant to *American*
Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974), permitted to proceed. See
28 *Washington Mutual* Order at 6, 15 (implicitly recognizing cross-jurisdictional
tolling for claims asserted under the Securities Act).

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*Counsel for Named Plaintiff General Board
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**PROOF OF SERVICE VIA ELECTRONIC POSTING PURSUANT TO
CENTRAL DISTRICT OF CALIFORNIA LOCAL RULES
AND ECF GENERAL ORDER NO. 10-07**

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is 1801 Avenue of the Stars, Suite 311, Los Angeles, California 90067.

On October 15, 2010, I caused to be served the following document:

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF RECENT
AUTHORITY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

By posting the document to the ECF Website of the United States District Court for the Central District of California, for receipt electronically by the parties as listed on the attached Service List.

And on any non-ECF registered party:

By Mail: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service that same day.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 15, 2010, at Los Angeles, California.

s/Michael Goldberg
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Mailing Information for a Case 2:10-cv-00302-MRP -MAN

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